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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 407

SIDNEY KROSS,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF

IRVING I. ERDHEIM,
Counsel for Petitioner.

ROBERT F. ARMSTRONG,
EDWARD M. CHAPIAN,
(on the Brief).

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Preliminary Statement

Your petitioner, Sidney Kross, respectfully submits this brief in reply to respondent's brief opposing the petition for a writ of certiorari to the Superior Court of Los Angeles County, State of California.

POINT I

With respect to facts set forth in respondent's brief.

A close scrutiny of the facts as disclosed by the record does not substantiate the strong and overwhelming inference of guilt of the petitioner which respondent seeks to convey to this Court.

Such an unwarranted inference is clearly refuted when it is considered that:

(a) The record is completely devoid of any testimony showing that petitioner was seen in possession of or physically removing from, any of the subject premises, any or all of the fur pieces in question.

(b) No testimony was adduced to show that petitioner was in actual physical reach of the said fur pieces.

(c) None of the fur pieces in question were ever produced upon the trial.

(d) The petitioner was not the only person present in each of the premises, there being employees of each firm and other customers present at all of the times mentioned.

Although the evidence produced by the prosecution remained uncontroverted, its strictly circumstantial character remained unaltered.

On page 4 of respondent's brief, it is stated that "the Court was not in session" when the event prejudicial to the petitioner occurred. The fact is that the Court was in session but the Trial Justice had announced a short recess at the time in question (fols. 739-748).

On page 6 of respondent's brief, it is there stated that the four jurors who were present at the time the incident in question transpired had just filed in near the close of the recess period. Respondent makes no reference to the record to substantiate the said statement. The uncontroverted fact is that there were four jurors in the box and others filing towards the box at the said time (fols. 739, 745).

Although the Trial Justice was not bound to accept the allegations contained in petitioner's affidavit which appears in folios 739-741, the fact is that they remained uncontroverted and were substantiated on the record by petitioner's trial counsel (fols. 743-747), in addition thereto, respondent's trial counsel, Mr. Rose, agreed and stipulated on the record that such substantiation was a true account of the incident in question (fols. 743, 747). There can be no question, therefore, that the allegations contained in petitioner's affidavit, and later in his petition, were a fair and true account of the unfortunate event and that respondent was not warranted in taking issue with the facts alleged in petitioner's brief.

POINT II

With respect to respondent's legal argument.

By no stretch of the imagination could it possibly be said that petitioner's guilt was "overwhelmingly established". The highly circumstantial nature of the evidence presented by the prosecution belies such conjecture.

Petitioner's brief amply illustrates the manner in which he was deprived of due process of law by State action, or inaction, which is the more appropriate term applicable herein. As had been heretofore stated in petitioner's brief, respondent's failure to adequately protect the rights and privacy of petitioner, to shield the jury from prejudicial influences, and the refusal to grant a mistrial after the Court had been apprised of the circumstances, constituted a denial of due process in view of the purely circumstantial case presented against petitioner.

Unfortunately, the action of the California tribunal and its desire to safeguard petitioner's rights, did not

coincide. The duly constituted judicial a[uthorities of the] respondent State have, as a matter of [record, shown a] difference of opinion with respect to th[e deprivation of] due process of law suffered by the petitio[ner. In the first] instance, that the Trial Justice himself w[as gravely con]cerned with the incident, is indicated on [the record when] petitioner's trial counsel reminds the Tri[al Judge as fol]lows:

> ". . . And at that time the Co[urt informed me] that the Court also thought that i[t was somewhat] prejudicial and that the Court was [willing to grant] a new trial but the Court was worrie[d about jeopardy] attaching; at which time, I informe[d the Court that] I doubted very much whether jeo[pardy attached.] And the Court also asked me if I wo[uld waive jeop]ardy . . ." (fol. 746).

At this point, petitioner's counsel, Mr[. Brand, asked] Mr. Rose, the prosecutor:

> "Is that substantially what occu[rred, Mr. Rose?] Mr. Rose: That is substantially [what occurred,] if your Honor pleases" (fol. 747).

Thus the Trial Court's original dispos[ition to grant a] new trial or mistrial stands uncontroverte[d.]

At the risk of repetition, it should also [be emphasized] that when the Supreme Court of California [denied the peti]tion for a hearing, two of the Justices [of said tribunal] dissented from the majority determination [indicating that] there existed some question of deprivation [of due process] in the minds of at least some of the membe[rs of the bench] of California's tribunal of last resort.

The inference made by respondent in i[ts brief that the] decisions of the California Courts indicat[ed that no Fed]eral question is here presented is prematur[e and presump]tious. The final determination of that que[stion rests with] this Honorable Tribunal.

CONCLUSION

In view of the weak circumstantial evidence presented by respondent and, in connection therewith, failure to adequately protect the rights of petitioner with a consequent refusal to grant a mistrial or new trial, constituted a denial of due process to the petitioner in violation of the Fourteenth Amendment to the Constitution of the United States. For all of the reasons herein and heretofore presented, the petitioner respectfully submits that his petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING I. ERDHEIM,
Counsel for Petitioner.

ROBERT F. ARMSTRONG,
EDWARD M. CHAPIAN,
(on the Brief).